Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1271

ROBERT O. POLLEY,
Petitioner,

vs.

WILBURN E. KIRKLAND, W. C. LONG, COY L. EMERET, GERALD PETTY, DONALD W. HUDSON, GARRY HARRIS and CONRAD ROBINSON, Individually and as Members of the Board of Trustees of the La Vega Independent School District, ROBERT W. CASTER, Individually and as Superintendent of the La Vega Independent School District, M. L. BROCKETTE, Individually and as Commissioner of the Board of Education of the State of Texas and THE STATE BOARD OF EDUCATION OF THE STATE OF TEXAS,
Respondents

APPLICATION FOR WRIT OF CERTIORARI OF PETITIONER, ROBERT O. POLLEY

Tony E. Duty
2309 Austin Avenue
Waco, Texas 76701
Attorney for Petitioner

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Respondents

_____

APPLICATION FOR WRIT OF CERTIORARI OF PETITIONER, ROBERT O. POLLEY

This is the petition for writ of certiorari of Robert O. Polley. Respondents are Wilburn E. Kirkland, W. C. Long, Coy L. Emeret, Gerald Petty, Donald W.

Hudson, Garry Harris and Conrad Robinson, Individually and as Members of the Board of Trustees of the La Vega Independent School District, Robert W. Caster, Individually and as Superintendent of the La Vega Independent School District, M. L. Brockette, Individually and as Commissioner of the Board of Education of the State of Texas and The State Board of Education of the State of Texas.

(a) The United States District Court, Western District of Texas, Austin Division, Roberts, J., rendered a Memorandum Opinion and Order on Motions for Summary Judgment on December 13, 1977. A copy of this opinion is appended. This judgment was appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the Court below on December 6, 1979. A copy of this Local Rule 21 decision is appended.

(b) The ground on which the jurisdiction of this Court is invoked is as follows:

Petitioner was employed as Principal of East La Vega Elementary School by the La Vega Independent School District. The School Superintendent and the Board of Trustees removed him from this position and demoted him to the position of classroom teacher at considerably lower pay and without administrative responsibilities. On appeal, the Commissioner of the Board of Education of the State of Texas and the State Board of Education upheld the School Board's action. This demotion deprived Petitioner of property rights secured by the Fourteenth Amendment without due process of law as the School Board's action was not supported by substantial evidence. Petitioner brought this suit under the Civil Rights Act of 1871, 42

U.S.C. Sec. 1983, and the Due Process Clause of the Fourteenth Amendment. The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C. Sec. 1343(3) and (4) and the federal question provision, 28 U.S.C. Sec. 1331. The date of the action of the United States Court of Appeals for the Fifth Circuit in affirming the decision of the Court below was December 6, 1979.

(c) The question presented for review is:

Did the District Court err in granting summary judgment for the Respondents on the basis that, as a matter of law, no cause of action upon which relief may be granted is stated under the due process clause of the Fourteenth Amendment to the Constitution of the United States and under the "federal question" provision, 28 U.S.C. Sec. 1331, under the facts of

this case which compel doubt as to the fairness and credibility of the hearing before the School District Board of Trustees, and, whether the ruling of this Court in *Bishop v. Wood*, 426 U.S. 341 (1976), under factual situations such as exist in this case, as set forth in the District Court's opinion and order, should be overturned or limited.

(d) The constitutional provisions and statutes which this case involves are:

(i) Amendment XIV, Sec. 1 of the Constitution of the United States;

(ii) The Civil Rights Act of 1871, Act of April 20, 1871, c. 22, Sec. 1, 17 Stat. 13, Title 42, U.S.C., Sec. 1983;

(iii) Title 28, U.S.C., Sec. 1343 (3) and (4);

(iv) Title 28, U.S.C., Sec. 1331.

(e) The following are the material facts of the case:

Petitioner has been employed by Respondent School District for over twenty years as a teacher or administrator. In 1972 he was appointed Principal of East La Vega Elementary School and served in that position until 1975 when he was removed as Principal and returned to a classroom teaching position. On February 19, 1975, Superintendent Caster of Respondent School District wrote Petitioner a letter informing him that the Board of Trustees on the previous day had met and "re-elected administrative personnel... for the 1975-76 school year or the appropriate time period, subject to re-assignment by the Superintendent of Schools." This same letter was sent to all school principals who were being rehired for the following school year and a different letter was sent to teachers. Petitioner, therefore, assumed that his contract as Principal was

being renewed. Later Petitioner was advised by Superintendent Caster that he was being "re-assigned" for the year 1975-76 to a classroom teaching position and relieved of his duties as principal, which Petitioner viewed as a demotion rather than a "re-assignment." Petitioner's protests included an April 8, 1975, appearance before the Board of Trustees requesting reasons for the change in his position. Upon recommendation of Respondent School District's attorney no explanation or reasons were given. Petitioner then retained counsel and, on May 9, 1975, in writing, requested a clarification of his status and asked for a public hearing on his proposed demotion. On May 27, 1975, Respondent School District's attorney wrote a letter to Petitioner's counsel setting a hearing for June 3rd and, for the first time, stated reasons for the demotion. At

the hearing before the Board of Trustees both Respondent School District and Petitioner presented evidence, including witnesses, exhibits and the testimony of Petitioner himself, and, at the conclusion of the hearing, the Board of Trustees met in closed session and unanimously voted to uphold the decision to demote Petitioner from principal to a classroom teaching position. Petitioner appealed through proper administrative channels and a hearing before Respondent Commissioner of Education was held on September 9, 1975. Respondent Commissioner of Education denied the appeal on December 29, 1975, and this decision was affirmed by Respondent Texas State Board of Education on February 13, 1976. Suit was filed by Petitioner in the United States District Court, Western District of Texas, Austin Division, on March 12, 1976, and the case

was submitted for decision on Motions For Summary Judgment by both Petitioner and Respondents, based upon the transcripts of the hearings before the Board of Trustees of Respondent School District and Respondent Commissioner of Education.

On December 13, 1977, the District Court considered the Motions for Summary Judgment of both Petitioner and Respondents and denied Petitioner's motion and granted Respondent School District's motion on the grounds that the transcripts of the hearings before the Board of Trustees of Respondent School District and Respondent Commissioner of Education contained substantial evidence to support the decision of Respondent School District to demote Petitioner. The Court, in its final judgment of December 13, 1977, reviewed the alleged reasons for the demotion of Petitioner and found the evidence "far from

strongly convincing" and, in fact, found that some of the evidence appeared to be "manufactured after the fact to bolster the allegations against Polley," which "casts doubt on the credibility of the entire proceeding." Since this is the very heart of Petitioner's contention that the factual situation of this case, as well as any similar case, necessitates the overturning or limiting of the application of the decision of this Court in *Bishop v. Wood*, 426 U.S. 341 (1976), a portion of the District Court's Opinion of December 13, 1977, is quoted here to demonstrate that the Court obviously shares Petitioner's opinion that the hearing before the Board of Trustees of Respondent School District was patently farcical and unfair:

> "Several grounds for the removal from his position as principal were given to Polley prior to the hearing. The Court notes, in passing, that several of them concern matters which did not arise until after the

February meeting at which the Board admittedly voted to demote Polley. The grounds included: (1) dissatisfaction with Polley's handling of a gift of playground equipment to East La Vega Elementary School by the local Parent-Teacher Organization (PTO); (2) Polley's unilateral action in promoting the installation of glass doors at the school; (3) attendance problems with regard to the scheduling of speech therapy classes at the school; (4) failure to fill out and return a grant application for Title III funds; (5) excessive class loads in Title I remedial reading classes; and (6) failure to attend a principals' workshop.

> "Without reviewing the testimony and exhibits in detail, the Court notes that the evidence of Polley's shortcomings with regard to each of the above charges is far from strongly convincing. The record shows Polley was widely liked and respected both as a teacher and an administrator, and in fact was rehired by the School District as a teacher. The testimony at the Board hearing indicates that the dissatisfaction with his performance as principal stemmed primarily from the Superintendent's disagreement with Polley over the construction priorities and scheduling system at the elementary school. Mr. Polley's testimony credibly refutes the allegations that he was deficient in remedying the speech therapy attendance problems; exhibits show that the teacher failed to keep attendance records on the forms

furnished her, and no such records were shown to Polley to apprise him of any problem. His testimony also tends to show that he followed the effective guidelines relative to class size limits in the remedial reading program.

"With regard to the principal's workshop, the only testimony as to the content indicates that it was more recreational than substantive, though Polley admitted that he did not follow the Superintendent's suggestion that he attend.

"The Court feels compelled to make further comment on the charge that Polley was late in furnishing the application for Title III funds. There was testimony from Superintendent Caster and his Assistant, O. P. Adams, that Polley failed to perform the assignment he was given to make the initial application for funds for a bilingual program. In support of their testimony, they introduced Respondents' Exhibit No. 6, which is a letter purportedly written to Caster by Adams on January 20, 1975, detailing the problems in obtaining Polley's application. The conclusion is almost inescapable, however, that the letter was written neither by Adams nor on January 20. The text of the letter refers several times to 'Mr. Adams' in the third person, and refers specifically to January 20 in the past tense as 'that date.' Although the Court is hesitant to attribute conspiratorial motives to the parties involved, it certainly would appear

to a reasonable reader that the letter was manufactured after the fact to bolster the allegations against Polley, and it is this Court's view that such evidence casts doubt on the credibility of the entire proceeding."

The Court, in granting Respondent School District's Motion for Summary Judgment, found that it could not "conclude that the allegations and testimony against Polley were so wholly lacking in substance as to render the Board's action *completely arbitrary*" (emphasis added) and based its decision on the admonition in *Bishop v. Wood*, supra, that:

" 'We must accept the hard fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways.' "

The United States Court of Appeals for the Fifth Circuit, on December 6, 1979, affirmed the District Court's judgment by Local Rule 21 Decision.

(f) Petitioner's argument, amplifying his reasons relied on for allowance of the writ, is as follows:

A reading of the District Court's judgment of December 13, 1977, compels the conclusion that the Court agrees with Petitioner's contention that the evidence against him adduced at the hearing before the Board of Trustees of Respondent School District was manufactured, trivial and of doubtful credibility. A reading of the transcript of that hearing will bear out the District Court's conclusions regarding the evidence and, overwhelmingly, enforces the opinion that Superintendent Caster, on February 19, 1975, hired Petitioner for an additional two year period

as Principal, subsequently decided to demote him to classroom teacher, and, when Petitioner protested, proceeded to manufacture evidence to use against him at the hearing before the Board of Trustees. Superintendent Caster and the Board of Trustees refused to give any reasons or explanation for the demotion until Petitioner retained counsel and requested a hearing, which was granted and held on June 3, 1975. In fact, Petitioner was told there were no complaints against him. The conclusion is inescapable that the Board of Trustees had already made the decision to demote Petitioner at the regular Board meeting in February, 1975, and had, in fact, hired Petitioner's replacement as principal at the time of the June 3, 1975, hearing. The trumped-up nature of the evidence against Petitioner is evident when the transcript of the hearing

is considered as a whole and the cavalier attitude of Respondent School District toward truth and honesty is apparent when the issuance of its 1967 Handbook to all personnel is considered. That Handbook states that Respondent School District's policy for employment is one of a "continuing contract" but, in fact, Respondent School District now contends that it never had any intention to grant personnel a "continuing contract" as such term is normally understood by members of the teaching profession and as defined under the provisions of the Texas Education Code.

As the District Court in its Judgment of December 13, 1977, observed, by letter of February 19, 1975, Superintendent Caster told Polley that he *had been* re-hired which, in a very similar case, *Stapp v. Avoyelles Parish School Board*, 1977, 545 F. 2d 527, created a non-subjective

expectancy of re-employment which established a property interest sufficient for Due Process requirements. Since Polley has a property interest sufficient to invoke the Due Process requirements of the United States Constitution, to hold that there is no necessity to require a fair forum to guard against arbitrary, capricious and unreasonable actions on the part of the administrative agency conducting the hearing is to create a right without substance. Mr. Justice Douglas, in his dissenting opinion in *Board of Regents v. Roth*, 1972, 408 U.S. 564, 92 S. Ct. 2701, 2712, 33 L. Ed. 2d 548, observed that the protection of the individual against arbitrary action is the very essence of due process and that the only check against the possibility of such arbitrary action is to prevent secret actions behind closed doors without notice to affected persons.

The evidence is compelling that this is exactly what happened in February of 1975 in the case at bar.

In *Roth*, supra, Mr. Justice Marshall, also dissenting, stated that prior decisions of the United States Supreme Court

> "...establish a principle that is as obvious as it is compelling—*i. e.*, federal and state governments and governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control.... The government may only act fairly and reasonably.
>
> "This Court has long maintained that 'the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.' "

Mr. Justice Marshall, in his dissent, continued:

> "...when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and

> protected against arbitrary government action.
>
> "Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action."

In the case at bar, it becomes readily apparent that the District Court had a fundamental question concerning the fairness of the hearing before Respondent School District's Board of Trustees and the credibility of the evidence introduced at that hearing against Petitioner. It thus becomes evident that blind adherence to the rule quoted by the District Court from *Bishop v. Wood*, 1976, 426 U.S. 341, 96 S. Ct. 2074, 2080, 48 L. Ed. 2d 684, would allow an unfair hearing in cases

such as the one at bar. This subjects public employees to unbridled capriciousness, unreasonableness and arbitrariness by governmental agencies and effectively destroys the guarantees of the United States Constitution's Due Process provisions.

In *Bishop v. Wood*, supra, Mr. Justice Brennan, in his dissent, in which Mr. Justice Marshall concurred, after stating that

> " 'It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undetermined.' "

continued:

> "These observations do not, of course, suggest that a 'federal court is...the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.' *Ante*, at 2080. However, the federal courts *are* the appropriate forum for ensuring that the constitutional mandates of due process are followed by those

> agencies of government making personnel decisions that pervasively influence the lives of those affected thereby; the fundamental premise of the Due Process Clause is that those procedural safeguards will help the government avoid the 'harsh fact' of 'incorrect or ill-advised personnel decisions.' *Ante*, at 2080. Petitioner seeks no more than that, and I believe that his 'property' interest in continued employment and his 'liberty' interest in his good name and reputation dictate that he be accorded procedural safeguards before those interests are deprived by arbitrary or capricious government action."

Also dissenting in *Bishop v. Wood*, supra, Mr. Justice White, joined by Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun, stated:

> "The views now expressed by the majority are thus squarely contrary to the views expressed by a majority of the Justices in *Arnett*. As Mr. Justice Powell suggested in *Arnett*, they are also 'incompatible with the principles laid down in *Roth* and *Sindermann*.' 416 U.S. at 166, 94 S. Ct. at 1650. I would not so soon depart from these cases nor from the views expressed by a majority in *Arnett*. The ordinance plainly grants petitioner a right to his job unless there is cause to fire him. Having

> granted him such a right it is the Federal Constitution, not state law, which determines the process to be applied in connection with any state decision to deprive him of it."

If, under the facts in this case, the majority decision in *Bishop v. Wood*, 426 U.S. 341 (1976), is to be followed without deviation, it appears that public employees, including members of the teaching profession, are afforded no protection whatsoever from arbitrary, capricious and dishonest decisions of administrative boards.

The District Court, in applying the substantial evidence rule in this case, seems to imply that a scintilla or smidgen of evidence is synonymous with substantial evidence. If this is so, then this oppressive rule should be modified or limited in cases of this kind so that local self-government will not perish under the weight of tyranny which always

develops when officials have such unbridled power and all effective restraints or review of their actions are removed when procedural due process becomes a mockery.

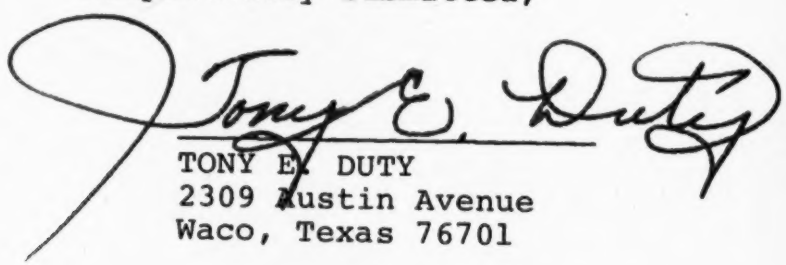
The case at bar provides an excellent vehicle to correct the pitfalls inherent in the majority decision in *Bishop v. Wood*, supra, in cases where the evidence is unconvincing, weak and contrived. If such an opportunity to promote fundamental fairness in such cases is allowed to pass, it will encourage governmental bodies, in conducting administrative hearings, to allow falsified, manufactured and erroneous evidence in support of their preconceived decisions, thereby allowing arbitrary, capricious and unreasonable actions against public employees, including members of the teaching profession, and assuring the members of such governmental

bodies that the Due Process provisions of the United States Constitution amount to nothing more than a procedural formality affording no protection to the objects of the governmental bodies' displeasure. While it is acknowledged that school boards should be allowed to operate their facilities, they should not be allowed to do so with the knowledge that they are completely unfettered in their actions and that their acts of capriciousness can know no bounds so long as the formal procedures of Due Process are followed. Hearings conducted without regard for honesty and fairness cannot fail to encourage perjury and deceit. Such unfettered power of administrative boards can result only in utter confusion and the degradation of public employees working for public institutions employing such tactics.

For these reasons certiorari should

be granted. The judgment of the United States District Court, Western District of Texas, Austin Division, affirmed by the United States Court of Appeals for the Fifth Circuit, should be reversed. The relief sought by Petitioner in the District Court should be granted.

Respectfully submitted,



TONY E. DUTY
2309 Austin Avenue
Waco, Texas 76701

Attorney for Petitioner

APPENDIX

APPENDIX A

MEMORANDUM OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT OF THE
UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ROBERT O. POLLEY	*	
	*	CIVIL ACTION
V.	*	
	*	NO. A-76-CA-46
WILBURN E.	*	
KIRKLAND, ET AL.	*	

MEMORANDUM OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

Came on this day for consideration by the Court cross-motions for summary judgment by Plaintiff, a former elementary school principal, and Defendants, the superintendent and Board of Trustees of the school district. To the extent necessary in this review of state administrative action, this opinion shall constitute

the Court's findings of fact and conclusions of law.

This is a suit by Robert Polley, a fifth-grade school teacher in the LaVega Independent School District in Waco, Texas, challenging the action of the School District Superintendent and Board of Trustees in removing him from the position of principal of East LaVega Elementary School and demoting him to the position of classroom teacher at considerably lower pay and without administrative responsibilities. Also listed as Defendants are the Commissioner of the Board of Education of the State of Texas and the State Board of Education, who upheld the School Board's action on appeal.

Plaintiff brings this suit under the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Due Process Clause of the Fourteenth Amendment. He alleges that his

demotion from principal to teacher deprived him of property rights secured by the Fourteenth Amendment without due process of law, and that the Board's action was unsupported by substantial evidence. Plaintiff has alleged jurisdiction under 28 U.S.C. §§1343(3) and (4) and 28 U.S.C. §1331. He seeks reinstatement as principal with equitable relief of back pay from the time of his demotion, together with costs and attorney's fees from the Defendants.

The record shows that Robert Polley has been employed by the LaVega Independent School District for over twenty years in either a teaching or administrative capacity. In 1972 he was appointed principal of East LaVega Elementary School, and served in that position until his removal in 1975. On February 19, 1975, Robert Caster, the Superintendent of the School District, wrote Polley a letter

informing him that at a meeting on the previous day the Board of Trustees had "re-elected administrative personnel... for the 1975-76 school year, subject to re-assignment by the Superintendent of Schools." This same letter was sent to all school principals who were being re-hired for the following school year; a somewhat different letter was sent to the school district teachers. Thus, Polley assumed that his contract as principal was being renewed.

Some time thereafter Caster advised Polley that he would not be continued as principal, but would instead be "re-assigned" to a classroom teaching position for 1975-76. Viewing such change not as a mere re-assignment to a new location, but rather as a demotion in status within the School District hierarchy, Polley protested. On April 8, 1975, he appeared

before the Board of Trustees and requested the reasons for the change in position. At that time, he was given no explanation, apparently on the recommendation of the School District's attorney. As a result, Polley retained an attorney, and on May 9, made a written request for clarification of his status and for a public hearing on his proposed demotion. On May 27, he received a letter from counsel for the School District, setting a hearing for June 3 and, for the first time, stating reasons for the Superintendent's action.

At the hearing before the Board of Trustees, the School District counsel called several witnesses to substantiate the allegations against Polley. Polley was represented by counsel at the hearing, and was permitted to cross-examine witnesses, to testify himself, and to call witnesses on his own behalf to refute the

charges. At the conclusion of the hearing the Board met in closed session and voted unanimously to uphold the decision to demote Polley from principal to a teaching position.

Polley appealed the decision through proper administrative channels. On September 9, 1975, he was given a hearing before the Commissioner of Education, who denied the appeal on December 29, 1975. On February 13, 1976, the Texas State Board of Education affirmed the Commissioner's ruling.

The present suit was filed March 12, 1976, and the transcripts of the Board hearing and the Commissioner's hearing have been submitted for the Court's consideration. By their respective motions for summary judgment, the parties agree that the central issue for this Court's determination is whether the action of the

Board of Trustees in demoting Plaintiff and reducing his salary was supported by substantial evidence.

Before reaching that question, the Court is constrained to consider several preliminary matters. First, the Court on its own motion notes the jurisdictional problem arising in this type of case as a result of the Fifth Circuit's decision in Muzquiz v. City of San Antonio, 528 F. 2d 499 (5th Cir. 1976). That holding precludes the use of §1983 and its jurisdictional counterpart, 28 U.S.C. §1343, as a basis for a suit against a school board. Since Plaintiff presents no claim for damages against the LaVega school officials in other than their official capacities, the Court is of the opinion that Muzquiz is a bar to relief under §1983 in the circumstances of this case. However, Plaintiff also has alleged a cause of

action arising under the Constitution of the United States, and asserts jurisdiction under the "federal question" provision, 28 U.S.C. §1331. In similar situations the Fifth Circuit has upheld jurisdiction over school districts on that basis, and the Court is confident that §1331 presents an adequate jurisdictional foundation for the present case. See Stapp v. Avoyelles Parish School Board, 545 F.2d 527, 531, n. 7, for further discussion on this jurisdictional question.

Second, Defendants contend that Plaintiff Polley has demonstrated no deprivation of an interest in "life, liberty, or property" which is cognizable under the Due Process Clause. Whether a constitutionally-protected property interest exists is determined by reference to state law. Bishop v. Wood, 426 U.S. 341 (1976); Siler v. Brady Independent

School District, 553 F.2d 385 (5th Cir. 1977). In this case, the Commissioner of Education found, and the record adequately supports the finding, that the LaVega Independent School District had not adopted the statutory "continuing contract" method of tenure which would have entitled Polley to the procedural protections set forth in Chapter 13, Subchapter C, of the Texas Education Code (1972). While Plaintiff correctly points out that the 1967 Handbook issued to the School District personnel states that the School District policy for employment is one of a "continuing contract", no reference is made therein to the Texas Education Code, nor do the School District's employment contracts embody the terms and conditions of Subchapter C, as required by Chapter 13, §13.101, of the Code.

The failure to adopt the optional

"continuing contract" method of tenure does not necessarily mean that Polley had no constitutionally-protected property interest in his expectation of continued employment as principal. Polley was working under a two-year term contract which was due to expire in August, 1975, and had the School District made no representation that he would be retained as principal after that date, he would have had only a subjective expectancy of continued employment in that capacity. As a non-tenured employee, he would not then have been entitled to due process protection from demotion at the expiration of his term contract. Bishop v. Wood, supra. But Superintendent Caster's letter of February 19, 1975, created a non-subjective expectancy of continued employment as principal. Along with the other principals in the School District, Polley was informed that

the Board of Trustees had "re-elected" the administrative personnel for the 1975-76 school year. The letter to Polley is remarkably similar to the notice received by the school principal in Stapp v. Avoyelles Parish School Board, supra, in which the Fifth Circuit held that a non-subjective expectancy was thereby created, consequently establishing a property interest sufficient for Due Process requirements. Polley's letter of renewal also clearly distinguishes Polley's situation from that of the teachers in Siler v. Brady Independent School District, supra, and Hix v. Tuloso-Midway Independent School District, 489 S.W.2d 706 (Tex.Civ. App.--1972, writ ref'd n.r.e.), where the only basis for the assertion of de facto tenure was a vaguely-stated policy by the respective school districts to rehire teachers whose work was satisfactory. In

this case, Robert Polley was told that he had been rehired.

The Defendants argue further that the clause in the letter from Caster which made Polley's employment for 1975-76 "subject to re-assignment" by the Superintendent prevented Polley from holding a reasonable expectation of continued employment as principal. The evidence adduced at the Board hearing indicates, however, that while the School District occasionally reassigned its principals from one campus to another, those persons remained in an administrative capacity. If the School District had wanted to rehire Polley as a teacher, the Superintendent could very easily have so indicated by sending Polley the renewal letter which was sent to the School District teachers. Moreover, in this Court's view, the term "re-assignment" does not ordinarily

signify a sharp change in employment status or a salary reduction of several thousand dollars. Cf. Moore v. Otero, 557 F.2d 435 (5th Cir. 1977), where the reassignment of a police corporal to patrolman was held not to involve a protected property interest. There, the position of corporal was available to all patrolmen on the basis of merit, there was no fixed additional compensation for corporals, and the reassignment of the plaintiff was explicitly provided for in the police department regulations, and did not affect the officer's civil service status. That situation certainly is very different than the distinction in employment status between a school principal and a classroom teacher. The Court finds that Plaintiff had a property interest sufficient for Due Process protection.

Having determined that a protected

property interest existed, the Court must examine the record of the administrative proceedings to decide whether the School District afforded Polley an adequate hearing, and if so, whether the Board of Trustees' decision was supported by substantial evidence. Stapp v. Avoyelles Parish School Board, supra, at 534. Plaintiff does not now contend that he was denied procedural due process, though he points out that the Board had already voted to uphold the Superintendent's decision to demote Polley by secret vote in February, 1975. That alone would not invalidate the decision if it is founded on a substantial basis, since it is the duty of the Board to hold a hearing, even if it does so in the first instance subsequent to discharge. Stapp v. Avoyelles Parish School Board, supra.

In determining whether there is in

the record substantial evidence to support an administrative determination, this Court may not substitute its judgment for that of the agency. Evidence which is substantial need be only enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from the evidence is one of fact for the jury. Watson v. Gulf Stevedore Corp., 400 F.2d 649 (5th Cir. 1968). Under that narrow standard, and after a thorough review of the entire transcript, the Court is of the opinion that there was substantial evidence to support the Board of Trustees' decision to demote Robert Polley.

Several grounds for the removal from his position as principal were given to Polley prior to the hearing. The Court notes, in passing, that several of them concern matters which did not arise until

after the February meeting at which the Board admittedly voted to demote Polley. The grounds included: (1) dissatisfaction with Polley's handling of a gift of playground equipment to East LaVega Elementary School by the local Parent-Teacher Organization (PTO); (2) Polley's unilateral action in promoting the installation of glass doors at the school; (3) attendance problems with regard to the scheduling of speech therapy classes at the school; (4) failure to fill out and return a grant application for Title III funds; (5) excessive class loads in Title I remedial reading classes; and (6) failure to attend a principals' workshop.

Without reviewing the testimony and exhibits in detail, the Court notes that the evidence of Polley's shortcomings with regard to each of the above charges is far from strongly convincing. The record shows

Polley was widely liked and respected both as a teacher and an administrator, and in fact was rehired by the School District as a teacher. The testimony at the Board hearing indicates that the dissatisfaction with his performance as principal stemmed primarily from the Superintendent's disagreement with Polley over the construction priorities and scheduling system at the elementary school. Mr. Polley's testimony credibly refutes the allegations that he was deficient in remedying the speech therapy attendance problems; exhibits show that the teacher failed to keep attendance records on the forms furnished her, and no such records were shown to Polley to apprise him of any problem. His testimony also tends to show that he followed the effective guidelines relative to class size limits in the remedial reading program.

With regard to the principal's workshop, the only testimony as to the content indicates that it was more recreational than substantive, though Polley admitted that he did not follow the Superintendent's suggestion that he attend.

The Court feels compelled to make further comment on the charge that Polley was late in furnishing the application for Title III funds. There was testimony from Superintendent Caster and his Assistant, O. P. Adams, that Polley failed to perform the assignment he was given to make the initial application for funds for a bilingual program. In support of their testimony, they introduced Respondent's Exhibit No. 6, which is a letter purportedly written to Caster by Adams on January 20, 1975, detailing the problems in obtaining Polley's application. The conclusion is almost inescapable, however,

that the letter was written neither by Adams nor on January 20. The text of the letter refers several times to "Mr. Adams" in the third person, and refers specifically to January 20 in the past tense as "that date." Although the Court is hesitant to attribute conspiratorial motives to the parties involved, it certainly would appear to a reasonable reader that the letter was manufactured after the fact to bolster the allegations against Polley, and it is this Court's view that such evidence casts doubt on the credibility of the entire proceeding.

Nonetheless, viewing the transcript as a whole, the Court cannot conclude that the allegations and testimony against Polley were so wholly lacking in substance as to render the Board's action completely arbitrary. Even though as an original matter the Court might view the evidence

differently, considerable deference and leeway must be given to the local officials in making personnel decisions. As the Supreme Court of the United States has recently admonished:

> "We must accept the hard fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways."

Bishop v. Wood, supra, at 349-50.

Accordingly, it is

ORDERED, ADJUDGED, and DECREED that Plaintiff's Motion for Summary Judgment be, and hereby is, DENIED, and that Defendants' Motion for Summary Judgment be, and hereby is, GRANTED.

Entered this 13th day of December, 1977, at Austin, Texas.

/s/ Jack Roberts
JACK ROBERTS
UNITED STATES DISTRICT JUDGE

APPENDIX B

LOCAL RULE 21 DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

NO. 78-1365

ROBERT O. POLLEY,
Plaintiff-Appellant,

versus

WILBURN E. KIRKLAND, ET AL.,
Defendants-Appellees.

Appeal from the United States District
Court for the Western District
of Texas

(DECEMBER 6, 1979)

Before COLEMAN, FRANK M. JOHNSON, JR. and
POLITZ, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule
21.[1]

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[1] See N.L.R.B. v. Amalgamated Clothing
Workers of America, 5 Cir., 1970,
430 F.2d 966.

APPENDIX C

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

Amendment XIV, Sec. 1 of the Constitution of the United States which reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Civil Rights Act of 1871, Act of April 20, 1871, c. 22, Sec. 1, 17 Stat. 13, Title 42, U.S.C., Sec. 1983, which reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

> and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 28, U.S.C., Sec. 1343(3) and (4), which reads:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> "(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Title 28, U.S.C., Sec. 1331, which reads:

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the

Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

"(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff."